AWANG OSEN AWANG MAT

v.

NORHAZLENA ABDURANI & ORS

HIGH COURT SABAH & SARAWAK, BINTULU
ABDUL AZIZ ABDUL RAHIM JC
[ORIGINATING SUMMONS NO: 24-91-2003 (BTU)]
26 JANUARY 2004

LAND LAW: *Dealings in land - Native Area Land - Transfer of native's rights and interests over land in Native Area Land to a non-native - Whether prohibited by law - Whether non-native could acquire good title to pass on to subsequent donees - Land Code (Cap 81) (Sarawak), s. 8 - Contracts Act 1950, s. 24*

NATIVE LAW AND CUSTOM: *Land dispute - Native Area Land - Transfer of native's rights and interests over land in Native Area Land to a non-native - Whether prohibited by law - Whether non-native could acquire good title to pass on to subsequent donees - Land Code (Cap 81) (Sarawak), s. 8 - Contracts Act 1950, s. 24*

LAND LAW: *Transfer - Indefeasibility of title and interests - Transfer of native's rights and interest over land in Native Area Land to a non-native - Whether instrument of transfer improper and illegal - Whether there was an allegation of fraud - Whether title indefeasible - Land Code (Cap 81) (Sarawak), ss. 132(1), 133(1), 134(1), (2)*

The plaintiff, who was the registered proprietor of a certain parcel of land in Native Area Land ('the said land'), alleged that he had inadvertently signed certain documents that he later realised consisted of a blank power of attorney and a blank memorandum of transfer. Upon inquiry, the plaintiff discovered that the said land had been transferred to various people *vide* the said documents without the plaintiff's consent or permission. By a purported power of attorney, an irrevocable power of attorney was given to one Moi ('Moi'), a Chinese, *vide* instrument no. L2413/1999. Then, the said power of attorney was replaced by a deed of substitution of power of attorney under instrument no. L2195/2000 whereon Moi was substituted as the plaintiff's purported attorney by two other Chinese persons. By the said deed of substitution of power of attorney, the said land was transferred to the 1st defendant under instrument no. L5705/2001 and by a power of attorney instrument no. L5706/2001, the 1st defendant granted a power of attorney to the 2nd, 3rd, 4th, 5th and 6th defendants.

Thus, the plaintiff sought to declare the following documents null and void: (i) the power of attorney instrument no. L2413/2000 ('the 1st PA'); (ii) the deed of substitution of power of attorney instrument no. L2195/1999 ('the 2nd PA'); (iii) the memorandum of transfer instrument no. L5705/2001 ('the MOT'); and (iv) the power of attorney instrument no. L5706/2001 ('the 3rd PA'). The plaintiff contended that since the 1st PA was to transfer a native's rights over the said land to a non-native, it was void by virtue of s. 8(b) of the Land Code (Cap 81) (Sarawak) ('the Code') and s. 24(a) and (b) of the Contracts Act 1950 ('the Act'). Therefore, under s. 8(e) of the Code, the plaintiff's rights over the land remained intact and by virtue of s. 66 of the Act, the 1st defendant ought to return the land to the plaintiff.

Held (partially allowing the application):

[1] The 1st PA effectively transferred all rights and interests over the said land to a non-native, Moi; this was prohibited by s. 8 of the Code and the 1st PA was caught by s. 24 of the Act. Although non-natives could still acquire rights over native land provided it is specially authorised by the Yang Dipertua Negeri in Council, the present case was not such an instance. The 1st PA was also executed with the intention to evade the provisions of the law and since it was illegal, Moi could not acquire good title to pass on to subsequent donees. The 2nd PA executed by Moi, as attorney for the plaintiff to transfer the rights and interest in the said land to two non-natives of Chinese origin, was invalid because it contravened s. 8(b) of the Code. It followed therefore that these two non-natives could not acquire or pass good title over the subject land to the 1st defendant. Thus, the MOT executed by them in favour of the 1st defendant was bad in law and void. (p 7 b-h)

[2] There was no allegation of a fraudulent act by the 1st defendant in obtaining the title to the said land. What was alleged against the 1st defendant was that the instrument by which she acquired the title through the registration of the MOT was improper and illegal. Such an allegation, however, could not, in light of ss. 133 and 134(2) of the Code, be held against the 1st defendant whose claim that she was a *bona fide* purchaser for value had not been challenged. By virtue of the combined effect of ss. 132(1), 133(1) and 134(1) of the Code, fraud, if proven, is the only ground that can defeat a registered proprietor's title. Since no fraud was alleged against the 1st defendant, she, as the registered proprietor, had a good and indefeasible title to the said land. (p 10 f-h)

[1st PA, 2nd PA and 3rd PA declared null and void; plaintiff's prayer for 1st defendant to re-convey land to plaintiff denied.]

Case(s) referred to:
Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***
Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd [1998] 3 CLJ 605 CA ***(refd)***
Frazer v. Walker & Anor [1967] All ER 649 ***(refd)***
Kho Kwang Choon v. Phuman Singh [1968] 1 MLJ 185 ***(refd)***
Law Tanggie v. Untung Gantang & Anor [1993] 2 MLJ 530 ***(dist)***
Manang Lim Native Sdn Bhd v. Manang Selaman [1986] 1 MLJ 379 ***(refd)***
Pawa Ajah v. Chung Kok Chiang & Anor [2002] 8 CLJ 751 HC ***(foll)***
Runin Pangan & Anor v. Gerada Bana & Anor [2000] 4 AMR 445 ***(refd)***
Wee Tiang Peck v. Teoh Poh Tin [1995] 1 MLJ 446 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 24(a), (b), 66
Land Code (Cap 81) (Sarawak), ss. 8(a), (b), (e), 9, 132(1), 133(1), 134(1), (2)
National Land Code, s. 340(2)(b)

Other source(s) referred to:
Halsbury's Laws of Malaysia, vol 8, para 150.191
Hinde & McMorland, *Introduction to Land Law*, 2nd edn, 1986 (Butterworth), p 82

For the plaintiff - Musa Dinggat; M/s Musa Dinggat & Advoc
For the defendants - KY Lin; M/s Kadir, Wong, Lim & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Aziz Abdul Rahim JC:
The brief facts of the case are as follows:

The plaintiff was the registered proprietor of all that parcel of land in the Native Area Land containing an area of approximately 5.585 hectares situated at Sungai Mas Bintulu and described as Lot 584 Block 35 Kemena Land District (formerly described as Lot 1500 Kemena Land District). Sometime in May 1999, the plaintiff's son by the name of Awang Khusairi was in need of cash money amounting to RM20,000. The plaintiff then was brought by his son to Miri to borrow RM20,000 whereon he was brought to the office of Messrs. Yi & Co where he was asked to and did sign several documents and a sum of RM19,000 was passed and received by the plaintiff's son. A sum of RM1,000 was deducted being the interest charged for the purported loan. It was agreed by all parties that the said sum was only a loan and the said land was only pledged as a surety for the loan. Plaintiff was then asked to leave and did leave the original title of the said land with the legal firm but the plaintiff kept the rent book for the said land to enable him to continue paying

the land rent in Bintulu. Plaintiff alleged that he could not read or understand English and alleged that he believed that the documents signed by him were loan documents. It was later that the plaintiff realised that the documents signed by him was a blank power of attorney and a blank Memorandum of Transfer. Upon the plaintiff's inquiry, plaintiff discovered that the said land had been transferred to various people *vide* the said documents without the plaintiff's consent or permission. By the said Memorandum of Transfer, the said land was transferred to one Setia bt. Dullah for a sum of RM27,000 but this transfer was never registered. By a purported power of attorney, an irrevocable power of attorney was given to one Moi Yew Khoo, a Chinese, *vide* instrument no. L2413/1999 and registered at the Bintulu Land Registry on 19 June 1999. Then the said power of attorney was replaced by a deed of substitution of power of attorney under instrument no. L2195/2000 and registered at the Bintulu Land Registry on 14 April 2000 whereon Moi Yew Khoo was substituted as the plaintiff's purported attorney by Antonio Sim Peck Khiong and Chee Seng Hee. By the said deed of substitution of Power of Attorney, the said land was transferred to the 1st defendant under instrument no. L5705/2001 and registered at the Bintulu Land Registry on 8 October 2001. By a power of attorney instrument no. L5706/2001 registered at the Bintulu Land Registry on 8 October 2001, the 1st defendant granted a power of attorney to the 2nd, 3rd, 4th, 5th and 6th defendants.

Therefore in this case, the plaintiff seeks to declare null and void the following documents namely:

a) Power of attorney Instrument No. L2413/1999 registered at Bintulu Land Registry on 19 June 1999 ("the 1st PA").

b) Deed of substitution of power of attorney Instrument No. L2195/2000 registered at Bintulu Land Registry on 14 April 2000 ("the 2nd PA").

c) Memorandum of Transfer Instrument No. L5705/2001 registered at Bintulu Land Registry on 8 October 2001 ("the MOT").

d) Power of attorney Instrument No. L5706 registered at Bintulu Land Registry on 8 October 2001 ("the 3rd PA").

The plaintiff also prays that the 1st defendant unconditionally re-convey Lot 584 Block 35 Kemena Land District (Formerly Lot 1500 Kemena Land District) to the plaintiff. Plaintiff grounded his application on illegality and is relying on s. 8 of the Sarawak Land Code ("the Code") and s. 24(a) & (b) of the Contracts Act 1950 ("the Contracts Act"), saying that he is a native; the land is a native land and the instruments were purported to transfer the interests in the land to a non-native (see para. 11 of plaintiff's affidavit).

The 1st defendant responded to the plaintiff's claim by stating that:

a) she is a native and therefore s. 8 of the Code does not apply (para. 5 of the 1st defendant's affidavit)

b) the transfer has been registered in her name. Thus she acquired indefeasibility of title, even if the instruments were void, by virtue of s. 134(2) of the Code, (para. 5 of the 1st defendant's affidavit)

c) she is *bona fide* purchaser for value (paras. 6.1 & 6.5 of the 1st defendant's affidavit)

d) there is no allegation of fraud against her.

Section 8(a) of the Code, prohibits non-natives from acquiring any rights or privileges over any Native Area Land (which is the case here), Native Customary Land or Interior Area Land. Section 8(b) of the Code provides that any agreement purportedly to transfer or convey any such rights or privileges shall be deemed to have been entered into for an illegal consideration and that any consideration given shall not be recoverable in any court and that no relief shall be given to any person claiming benefit under the instruments except as provided under s. 8(d), which is not relevant to this instant case, of the Code. Section 8(e) of the Code then provides that rights and privileges of any natives shall not be adversely affected by any agreement mentioned in s. 8(b) of the Code.

Section 24(a) and (b) of the Contracts Act 1950 provides that the consideration or object of an agreement is lawful unless it is forbidden by law or it is of such nature that, if permitted, if would defeat any law. The section goes on to provide that if the object or consideration is unlawful, then the agreement is void.

The consequence of a void contract is provided in s. 66 of the Contracts Act which stipulates that any person who has received any advantage under a void agreement or contract is bound to restore the advantage/benefit and to make compensation for it.

Thus the plaintiff contends that since the 1st PA was to transfer the natives' right over Native Area Land to a non-native, the PA is void by virtue of s. 8(b) of the Code and s. 24(a) & (b) of the Contracts Act; and by virtue of s. 8(e) the rights of the plaintiff over the land remain intact and by virtue of s. 66 of the Contracts Act, the 1st defendant ought to return the land to the plaintiff.

In *Pawa ak Ajah v. Chung Kok Chiang & Anor* [2002] 8 CLJ 751, Skinner J, in dealing with ss. 8 and 9 of the Code, said at p. 765:

> From my reading of the provisions of ss. 8 and 9 of the Code, the intention of the Code, which cannot be any more plainly stated than in those two sections, is directed at prohibiting and preventing any person who is a non-native of Sarawak from acquiring any rights or privileges over Native Area Land, except in the very limited circumstances permitted by the Code. And to prevent evasion, any agreement that is entered into which would result in such rights and privileges being enjoyed by a non-native is deemed to have been entered into for an illegal consideration and exposes the parties thereto to a penal sanction as well.

On the power of attorney executed in *Pawa*'s case, the same learned judge had this to say:

> I would also say that the execution of the power of attorney has resulted in those rights and privileges I have just mentioned being enjoyed and exercised by the first defendant. From the extent of the rights and privileges which have been granted over the said land under the power of attorney to the first defendant, it is very apparent that practically every right and privilege except the nominal ownership in the said land has been parted with by Nyanau. Thus, although the power of attorney states that the first defendant acts on behalf of Nyanau in exercising those rights, in reality they had passed to and were exercised and enjoyed by the first defendant. The power of attorney was, in my view, a colourable device entered into to facilitate an evasion of the Code and in fact deemed to be entered into for an illegal consideration under s. 8(b) of the Code.

In *Pawa*'s case, one Nyanau ak Bunya, a native, was the registered proprietor of the land in question. In 1991 he created a PA in respect of the land in favour of the 1st defendant in that case. The 1st defendant then sold the land to the 2nd defendant and executed a Memorandum of Transfer in respect thereof. But the Memorandum of Transfer was never registered. Following his death in 1998, the plaintiff, the widow and administratrix of Nyanau's estate applied for declaration that the PA and the unregistered Memorandum of Transfer were null and void having contravened s. 8 of the Code as well as ss. 2 and 24 of the Contracts Act 1950.

In this instant case too, the power of attorney was purportedly executed by a native donor, the plaintiff, in favour of a non-native donee, one Moi Yew Khoo, purportedly empowering the donee to exercise the rights over the said land on behalf of the donor. But having perused the provisions in the power of attorney I find that the donor is only a nominal owner. It is pertinent to note that the 1st PA is an irrevocable PA. The real rights and privileges over the land are

vested with the donee. Therefore, in this case, I am of the same view as that of Skinner J that the power of attorney is a colourable device to evade the provisions of the Code namely s. 8 of the Code.

Thus, following the reasoning and decision of Skinner J in *Pawa ak Ajah* I hold that the 1st PA effectively transferred all rights and interest over the said land in the Native Area Land to a non-native – a Chinese; something that is prohibited by s. 8(b) of the Code. So in my view the 1st PA is caught by s. 24 of the Contracts Act. The donee under the 1st PA ie, Moi Yew Khoo is non-native; she being a Chinese. It is noted also that the prohibition in s. 8 of the Code is not an absolute prohibition. Non-natives can still acquire rights over Native land provided it is specially authorised by the Yang Dipertua Negeri in Council (see: *Manang Lim Native Sdn. Bhd. v. Manang Selaman* [1986] 1 MLJ 379). Obviously the donee ie, Moi is not a category of person referred to in *Manang*'s case. There is no evidence to show otherwise; and the 1st defendant also did not say or claim that Moi is such category of person.

I also find that the 1st PA that was executed in favour of Moi by the plaintiff is not one that comes within the ambit of the decision in *Law Tanggie v. Untung ak Gantang & Anor* [1993] 2 MLJ 530, a judgment by Richard Malanjum JC, which held that if the arrangement is not with the intention to evade the provisions of the law then the arrangement cannot be faulted. It is only where the arrangement is made to evade the Code that such arrangement will be cut down (*Dato' Haji Nik Mahmud Daud v. Bank Islam Malaysia Bhd* [1998] 3 CLJ 605; *Wee Tiang Peck v. Teoh Poh Tin* [1995] 1 MLJ 446). In this particular instant the 1st PA is a direct contravention of s. 8 of the Code.

Since the 1st PA is illegal, it follows therefore that Moi cannot acquire good title to pass on to subsequent donees.

On the same premises, the deed of substitution of power of attorney (the 2nd PA) executed by Moi Yew Khoo, as attorney for the plaintiff (exh. D in plaintiff's affidavit) to transfer the rights and interest in subject land to non-natives namely one Antonio Sim Peck Khiong and Chee Seng Hee, both of Chinese origin, is invalid for contravening s. 8(b) of the Code. In the circumstances the subsequent 2nd PA could not also pass good title to its recipient. It follows therefore that Antonio and Chee could not acquire or pass good title over the subject land to the 1st defendant. Thus the MOT (exh. F in plaintiff's affidavit) executed by Antonio and Chee in favour of the 1st defendant is bad in law and void.

Having come to that conclusion; does the court have jurisdiction to grant the second prayer by the plaintiff ie, to re-convey the land back to the plaintiff after the 1st defendant has been registered as the registered proprietor?

Counsel for the plaintiff submitted that the doctrine of indefeasibility of title under s. 132(1) of the Code is not absolute. It was contended that the opening words of that section which reads "subject to this Code ...' suggest that the indefeasibility of title under the Code could be challenged on grounds other than fraud. It was suggested that one of the grounds is illegality because s. 8 of the Code is very specific about illegalities. Reliance was placed on *Runin ak Pangan & Anor v. Gerada ak Bana (f) & Anor* [2000] 4 AMR 445 in which Sulaiman Daud JC (as he then was) held that notwithstanding the provision of s. 132 of the Code a registered title may be made defeasible on grounds other than fraud, such as binding interests and equities. Learned counsel for plaintiff also cited *Pawa*'s case *(supra)* and contended that the instant case is on all fours as in *Pawa*'s case *supra*. However in *Pawa*'s case it is to be noted that the court was dealing with the MOT that was not registered. This is apparent from one of the prayers sought in that case which is a declaration that the unregistered Memorandum of Transfer dated 8 June 1997 is invalid, null and void. The non-registration of the MOT in *Pawa*'s case is also obvious from the following passage of the learned judge's judgment which appears at p. 755-756 of the report. It reads:

> When the application came for hearing, it became apparent to me from what was disclosed in the affidavits and submission of counsel for the plaintiff that issues raised between the plaintiff and the first defendant affected the position of Regina Mado because the plaintiff was seeking to have the Power of Attorney declared invalid and void and any decision I may make there on would definitely affect her claims to the said land as **the unregistered memorandum of transfer** which she relies upon for her entitlement to be a beneficial interest on the said land was executed by the first defendant on the strength of the Power of Attorney, the validity of which was now being attacked in these proceedings. (emphasis added)

It is plain that in *Pawa*'s case there is no issue of a defendant, being a registered proprietor, re-conveying the land which has been registered in his/her name to the plaintiff on the ground that the registration of the title in the defendant's name was pursuant to a void instrument as in this instant case.

At this juncture, it may be observed that s. 132(1) of the Code provides that the registered proprietor of any estate or interest in land to which the section applies, holds such estates or interest subject to the interest noted on the register, and he holds so free from all other interests. This is the doctrine of indefeasibility of title entrenched in s. 132. However there are certain exceptions

to this doctrine and these exceptions, in so far as they relate to s. 132 of the Code, are mentioned in the section itself. But none of the exceptions applies in this instant case.

Furthermore, s. 134(2) of the Code gives a person indefeasible title once it is registered (see: *Kho Kwang Choon v. Phuman Singh* [1968] 1 MLJ 185). A registered *bona fide* purchaser for value, and in the absence of fraud, may claim good title. In this regard it is pertinent to note that under s. 133 of the Code the doctrine of notice does not apply. In *Halsbury's Laws of Malaysia* vol. 8 at para 150.191, the effect of fraud *vis-a-vis* indefeasibility of title under the Code is explained as follows:

> The Sarawak Land Code provides that any issue document of title or entry or alteration in the Register procured or obtained by fraud will be void as against the person defrauded or who may be defrauded thereby, and no person who is a party or privy to the fraud, or claims solely as a volunteer under such person, must take any benefit therefrom. It does not, however, make defeasible the title of a successor in title to a party who was guilty of fraud, or a party or privy to fraud; instead so long as that successor is able to claim that he acted in good faith and for value, his title is indefeasible not only against his predecessor's fraud but also against error or misdescription.
>
> Once the doctrine of notice has been abrogated, then the fraud to which this provision refers must be actual fraud.

The indefeasibility of title is not defeated by the illegality of the document or instrument of title (see: *Adorna Properties Sdn. Bhd. v. Boon Som Boonyanit* [2001] 2 CLJ 133). In my view under the Code, registration by void instrument does not affect indefeasibility of title. Unlike s. 340 of the National Land Code ("NLC") which is applicable in Peninsular Malaysia, s. 132 of the Code does not have the equivalent of s. 340(2)(b) of NLC. The latter clearly provides that registration obtained by void instrument could not confer indefeasibility of title on the registered proprietor. Under the Torrens System, which applies to the Code, the register is everything. It was decided in *Frazer v. Walker & Anor* [1967] All ER 649 that registration was effective to vest title in registered proprietor notwithstanding that he acquired his interest under an instrument that was void. In a book *Introduction to Land Law* by Hinde and McMorland, 2nd edn, 1986 (Butterworth) at p. 82 the following passage is found:

The effect of the Privy Council advice in *Frazer v. Walker* was summarised by Barwick CJ in *Breskvar v. Wall* as follows:

> The Torrens system of registered title ... is not a system of registration of title but a system of title by registration. The title ... (which the certificate of title) certifies is not historical derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void. The affirmation by the Privy Council in *Frazer v. Walker* of the decision of the Supreme Court of New Zealand in *Boyd v. Mayor of Wellington* now places that conclusion beyond question ..!

The law therefore is well settled: that the registration conferred on the registered proprietor an indefeasibility of title. In so far as it relates to the Sarawak Land Code, it is manifested in s. 132. Though the indefeasibility of title may be challenged on the ground of fraud, such ground cannot be used to defeat a title acquired by registered *bona fide* purchaser and for value. This in my view is plain from the reading of s. 134(2) which states as follows:

> Nothing in this Code shall be construed as to place in doubt the title of any person who is a purchaser in good faith and for value of any interest, and who is registered as the proprietor of such interest, on the ground that the registered proprietor through or under whom he claimed was registered as proprietor through fraud or error, whether such fraud or error consisted in a misdescription of the land or otherwise.

On the facts of the instant case, there is no allegation of a fraudulent act by the 1st defendant in obtaining the title to the said land. What is alleged against the 1st defendant is that the instrument by which she acquired the title through registration of MOT was improper and illegal. In my view, however, such allegation cannot, in the light of ss. 133 and 134(2) of the Code be held against the 1st defendant whose claim that she was a *bona fide* purchaser for value has not been challenged. It is also my opinion that the combined effect of ss. 132(1) and 134(1) and 133(1) of the Code is that fraud, if proven, is the only ground that can defeat a registered proprietor's title. I say so because fraud is the express exception in s. 132(1) and 133. Under s. 134(1), any issue document of title obtained by fraudulent means or any alteration or entry in the register made by a fraudulent act is void against the person defrauded.

Since no fraud is alleged against the 1st defendant, I conclude, therefore, that the 1st defendant, as registered proprietor has a good and indefeasible title to the said land. In the circumstances I hold that the plaintiff's 2nd prayer ought to be denied.

For the above mentioned reasons, I make the following orders:

a) that the plaintiff's prayer (a) is granted to the extent that the Power of Attorney Instrument No. L2413/1999 (the 1st PA); the Deed of Substitution of Power of Attorney Instrument No. L2195/2000 (the 2nd PA); and the Power of Attorney Instrument No. L5706 (the 3rd PA) are hereby declared illegal, null and void and of no effect.

b) that the 1st defendant has acquired an indefeasible title to the subject land upon the registration of the Memorandum of Transfer.

c) that the plaintiff's prayer (b) is denied.

I further order that each party pays its own cost.